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SUPREME COURT OF THE UNITED STATES

No. 740

CHARLES THORNBERRY, - - - Petitioner,

versus

BUCHANAN COUNTY COAL CORPORATION, - - - - Respondent.

APPEAL FROM THE UNITED STATES COURT OF APPEALS, FOR THE SIXTH CIRCUIT.

PETITION FOR WRIT OF CERTIORARI TO THE SIXTH CIRCUIT.

DAN JACK COMBS,
Pikeville, Kentucky
Attorney for Petitioner.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

Supreme Court of the United States

No. _____

CHARLES THORNBERRY, - - - - - *Petitioner,*

v.

BUCHANAN COUNTY COAL CORPORATION, - *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE SIXTH CIRCUIT.

The petitioner, Charles Thornberry, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Sixth Circuit in this case.

OPINION BELOW.

The opinion below has been reported in Charles Thornberry v. Buchanan County Coal Corporation, 323 F. 2d 517. A copy of the opinion is appended to this petition.

JURISDICTION.

The judgment of the court below was dated and entered October 11, 1963.

The jurisdiction of this court is invoked under United States Code, Title 28, Section 1254(1).

QUESTION PRESENTED.

Has the purchaser of all the coal in one, only, of several horizontal deposits the right to destroy other coal measures lying above a part of the purchase when the acquisition was subject to a provision that the mining rights granted were to be exercised so as not to interfere unnecessarily with the mining of other seams by the grantors, their heirs and assigns.

LAW INVOLVED.

The petitioner relied upon the rule of law that a deed should be construed so as to give effect to all its parts and provisions, Virginia Iron, Coal & Coke Co. v. Dye, 146 Ky. 521, 142 S. W. 1058, and upon a rule that interference with a right in real property is a taking of that right, Ferguson v. Covington, 108 Ky. 662, 57 S. W. 460.

Decisions of the forum sustain these rules.

STATEMENT.

Petitioner, Charles Thornberry, received from his father a deed conveying fifty acres of coal land in Pike County, Kentucky [Appendix, 12a-15a].

Some twenty-five years later he conveyed all the coal in the Clintwood Seam, upon this same tract, to the respondent. This deed [Appendix, 16a-19a] contained no specification of mining rights, but allowed respondent the same privileges petitioner had acquired when he received the coal from his father, subject,

however, to this limitation, "But the same are to be exercised so as not to interfere unnecessarily with the mining of other seams by first parties, their heirs and assigns" [Appendix, 17a].

Respondent entered upon its purchase and removed the coal so as to destroy three seams it had not purchased which lay above the Clintwood Seam and on 8.72 acres of the fifty acre tract.

Petitioner brought suit for his damages in the Pike Circuit Court, of Pike County, Kentucky, where the land lay.

Respondent removed to the United States District Court for the Eastern District of Kentucky on the ground of diversity of citizenship, because it is a Virginia corporation and petitioner a citizen of Kentucky.

Upon trial, which petitioner conducted without assistance of counsel, the court found against petitioner, hearing no evidence on behalf of respondent.

ARGUMENT.

The opinion of the Court of Appeals emphasizes the respondent's assertion that it did nothing negligent in the destruction of petitioner's property. The District Court, in its findings of fact and in its conclusions of law, had fallen into the same channel.

The petitioner did not seek damages for negligence. The respondent did not defend a charge of negligence. The petitioner sought damages because respondent had bought one seam of coal and taken four. Wrong is not excused because it is skillfully done.

During the evidence of the first witness for the petitioner the trial court limited his evidence to exclude the measure of damages saying, "And I think we might as well leave the question of measure of damages out of it until we determine whether or not under the law and facts this defendant has wrongfully mined coal there, which has caused you to lose other coal or other minerals" [Appendix, 40a].

Notwithstanding this, the trial court in deciding, said "Plaintiff's proof does not provide the court any basis on which his damages could be ascertained" and commented further, "On such proof it would be necessary for the court to indulge in speculation to place a monetary value on plaintiff's damages, which, of course, the court may not do" [Appendix, 106a].

The decision that the respondent could buy one seam of coal and take three others is in violent conflict with the applicable law of the Commonwealth of Kentucky. It is a precedent, already having its effect, for the waste of an irreplacable mineral resource by ruthless mining. This is aggravated further because the devastation occurs in a distressed region where spoliation for the same purpose is already a scandal of national proportions.

If further considerations were needed, the error of the trial court, in restraining the petitioner from producing evidence of the measure of damages and then deciding against him because he had not produced it, is such a departure from the usual course of judicial proceedings, sanctioned in the Sixth Circuit by affirmance, as to justify supervision.

Wherefore, it is respectfully submitted that this petition should be granted.

DAN JACK COMBS,
Pikeville, Kentucky,
Attorney for Petitioner.

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 15206

CHARLES THORNBERRY,
Plaintiff-Appellant,

v.

BUCHANAN COUNTY COAL CORPORATION,
Defendant-Appellee.

APPEAL from the United States District Court for the Eastern District of Kentucky, at Pikeville, Kentucky.

OPINION—Decided and Filed October 11, 1963.

Before: MILLER, WEICK and O'SULLIVAN, Circuit Judges.

PER CURIAM. Defendant purchased *all* of the coal in the Clintwood seam in land owned by plaintiff. The deed of conveyance therefor also granted mining rights but "to be exercised so as not to interfere unnecessarily with the mining of other seams" by plaintiff.

In removing the coal which defendant purchased, overlying seams of coal located on plaintiff's land were deprived of support and collapsed.

It was the claim of plaintiff that defendant should have left in place sufficient coal to provide pillars to support the overlying seams. Plaintiff's witness, Cecil Ramey, estimated that from 40 to 50% of the coal in the Clintwood seam would be required to support the overlying strata. We do not construe the deed of conveyance as imposing any such obligation on the defendant.

The proof at the trial disclosed that defendant conducted its mining operations in the usual manner. There

was no evidence of negligence or that defendant did anything not necessary in normal mining operations. If plaintiff desired to retain support for his overlying seams of coal, he should have provided for it in plain language in the deed of conveyance. The defendant might not have been willing to pay for all of the coal in the Clintwood seam if only half of it could be removed.

In our opinion, the District Court was correct in dismissing the complaint at the close of plaintiff's evidence.

The judgment of the District Court is affirmed.

FILED
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JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1963

No. 740

CHARLES THORNBERRY, Petitioner,

versus

BUCHANAN COUNTY COAL CORPORATION, Respondent.

RESPONSE.

JOE HOBSON,
Prestonsburg, Kentucky.
Attorney for Respondent.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

IN THE

Supreme Court of the United States

October Term, 1963

No. 740

CHARLES THORNBERRY, - - - - - *Petitioner,*

v.

BUCHANAN COUNTY COAL CORPORATION, - *Respondent.*

RESPONSE.

STATEMENT OF THE CASE.

Respondent accepts petitioner's statement of the case except in two respects:

(1) Contrary to the impression created by the petition, the deed in question executed by the petitioner conveyed broad mining rights to the respondent including among others the "right to remove all pillars, lateral and subjacent supports without leaving same to support the surface" and included a release of liability from damages. Such rights and the release were contained in petitioner's two source deeds (Joint Appendix, 12a-15a; 22a-26a) and petitioner's deed to respondent provided: "This conveyance includes all the mining rights, privileges and releases * * *" granted petitioner by the first of his two source deeds. The deed to respondent contained a provision that the mining rights were to be exercised so as not to "inter-

fere unnecessarily" with the mining of other seams but the conveyance further provided, "as a moving consideration for this sale", any mining in underlying seams were to be conducted so as to protect development of the single seam purchased by respondent (Appendix, 17a-18a). To this extent the "other seams" were servient to the dominant estate granted respondent.

(2) Petitioner's statement that respondent's mining in the seam it had purchased "destroyed" three seams of coal it had not purchased is not supported by the record. To the contrary, the trial court found there was no proof of probative value that respondent's mining in any way affected possible future mining of other coal. See. Appendix, 97a (oral opinion) and 105a (formal Findings of Fact).

ARGUMENT.

In both courts below, petitioner has contended the "unnecessary interference" clause in the deed to respondent imposed on respondent an obligation to conduct its mining in the seam covered by the grant in such a way that 40 or 50% of the coal would be left in pillars to support the overlying strata. Both the District Court and the Court of Appeals rejected such a construction, holding that, having purchased *all* the coal, respondent had the right to redeem it.

At the conclusion of petitioner's proof; the trial court, acting under Rule 41 (b), ruled that petitioner had shown no right to relief.

The basis of this ruling was that the deed explicitly conveyed *all* the coal in the Clintwood seam and, there being "no evidence that these people did more than conventionally mine this coal," there was a failure of proof of unnecessary interference with other seams.

This finding rests on "an inference drawn from undisputed facts and documentary evidence." Some of the courts of appeal on review of such decisions have felt free to draw their own conclusions and ultimate inferences. It has been said that "the authorities are indescribably confused" (2 B Barron and Holtzoff, Sec. 1132, p. 516), but the text of Rule 52(a), the Committee Note to that Rule and the decisions of this court make it abundantly clear that the "clearly erroneous" rule applies. *Commissioner* v. *Duberstein*, 1960, 363 U. S. 278, 80 S. Ct. 1190, 4 L. ed. 2d 1218; *U. S.* v. *U. S. Gypsum Co.*, 1948, 333 U. S. 364, 68 S. Ct. 525, 92 L. Ed. 746. That the "clearly erroneous" rule applies as well to dismissals for insufficiency of evidence under Rule 41(b) is just as clear. [See Committee Note to Amended Subdivision (b), and Allred v. Sasser, 170 F. 2d 233 (7th Cir., 1948)]. That being so, this court must refuse to grant certiorari here, where in spite of an extravagant statement or two in the petition, review "would be of no importance save to the litigants themselves." *Rudolph* v. *U. S.*, 1962, 370 U. S. 269, 82 S. Ct. 1277, 8 L. Ed. 2d 484, 486.

And especially should review be denied where both courts below have decided the question against petitioner. In *Comstock* v. *Institutional Investors*, 1948,

335 U. S. 211, 214, 68 S. Ct. 1454, 92 L. Ed. 1911, 1915, the court said:

> "A seasoned and wise rule of this Court makes concurrent findings of two courts below final here in the absence of very exceptional showing of error."

Not only does the petition fail to show error—much less, "very exceptional" error—the "special and important" reasons for granting review required by Rule 19 of the Revised Rules of this court are likewise missing. Not much need be said in this regard. It should be said it is most difficult to see how our little damage case involving conventional deep mining can be part of "a scandal of national proportions," petitioner's reference being to "open-pit" or surface mining. Such argument has no bearing on the situation here.

And petitioner's accusation that the District Judge restrained petitioner from introducing evidence on damages and then ruled against him because he had not produced it is grossly inaccurate. On the trial the District Judge devoted the utmost effort to the impossible task of preventing petitioner's lack of technical knowledge from being a disadvantage to him in the presentation, pro se, of this case. After petitioner had announced through, respondent made its motion under Rule 41(b), specifying the ground, among others, that petitioner had failed to prove damages, if any he had. The trial judge thereupon gave petitioner the opportunity of presenting additional evidence but petitioner refused the offer (See Appendix, 93a).

CONCLUSION.

We submit that the District Court made a finding subject to the "clearly erroneous" rule. The Court of Appeals having affirmed, such a finding is final and cannot be drawn in question on certiorari here, the "special and important" reasons of Rule 19 being entirely absent.

The writ should be denied.

Respectfully submitted,

JOE HOBSON,
Prestonsburg, Kentucky,
Attorney for Respondent.